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IN THE

Supreme Court of the United States

DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE SENTENCING PROJECT AND THE CENTER FOR THE STUDY OF RACE AND LAW AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MATTHEW M. SHORS
(Counsel of Record)
PAMMELA QUINN
O'MELVENY & MYERS, LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

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BRIEF OF THE SENTENCING PROJECT AND THE CENTER FOR THE STUDY OF RACE AND LAW AT THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Sentencing Project and The Center for the Study of Race and Law at the University of Virginia School of Law submit this brief *amici curiae* in support of the petitioner.[1]

INTEREST OF *AMICI CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on

[1] Pursuant to Rule 37, a blanket letter of consent from the petitioner has been filed with the Clerk of the Court. A letter of consent from the respondent United States authorizing the filing of this brief is also on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief.

issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, and promotes cost-effective and humane responses to crime.

The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and professional audiences. Because of its particular expertise and interest in this issue, The Sentencing Project also filed a brief *amici curiae* (jointly with the American Civil Liberties Union) specifically addressing the crack-powder cocaine disparity in *Claiborne v. United States*, 127 S. Ct. 2245 (2007).

* * *

The Center for the Study of Race and Law at the University of Virginia School of Law ("Center")[2] seeks to provide opportunities for students, scholars, practitioners, and community members to examine and exchange ideas related to race and law. The Center coordinates and promotes the substantial array of existing Law School programs on race and law, including courses, public lectures, scholarly workshops, symposia, and informal discussions, and enhances these offerings by sponsoring additional programs, often in partnership with interested student organizations. The Center also offers a concentration of courses on race and law, including 10 core courses and more than 20 related offerings, and serves as a resource for faculty whose teaching or scholarship addresses subjects related to race.

Due to the Center's expertise in race-related scholarship and deep commitment to public service, the Center files this

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[2] The views expressed in the brief are endorsed only by the Center and do not necessarily reflect the views or opinions of the University of Virginia.

amici curiae brief to facilitate more critical and substantive dialogue on laws that have a disparate racial impact and to demonstrate to students how practitioners blend legal theory with contemporary Supreme Court practice.

SUMMARY OF ARGUMENT

The sentence below illustrates why a sentence within the Guidelines range may not be the only reasonable choice in many cases, particularly one involving controlled substances generally and crack cocaine in particular. Unlike the Guidelines ranges chosen for other offenses, such as the perjury offense at issue in *Rita v. United States*, 127 S. Ct. 2456 (2007), ranges for drug offenses (Guidelines Part D) were not even arguably derived using an "empirical approach." The Guidelines thus fail to take account of all the § 3553(a) factors. Instead, the drug Guidelines ranges are driven almost entirely by the type and quantity of the substance involved.

The Commission intended drug type and quantity to approximate the "seriousness of the offense." The crack cocaine illustration demonstrates how this attempt does not always succeed. In fact, *low-level* crack cocaine offenders often receive similar sentences under the Guidelines to *high-level* powder cocaine offenders.

Because many § 3553(a) factors other than the type and quantity of drug may indicate that a shorter sentence is warranted in an individual drug case, sentencing courts may reasonably impose below-Guidelines sentences, as did the district court below. In order to carry out the statutory mandate, sentencing judges must be allowed to—indeed, should be required to—consider all relevant information, including reports of the Sentencing Commission when they are pertinent to the sentencing decision at issue. In particular, when making sentencing decisions in cases involving crack cocaine, such reports and other expert opinion may prove particularly helpful given the fact that two decades of

experience have yielded an enormous database of information undermining any argument for a 100:1 crack-powder ratio.

Here, the district court properly considered only relevant information and imposed a reasonable sentence reflecting all of the relevant § 3553(a) factors. Mr. Kimbrough's sentence—well in excess of the sentence to which he would have been subjected had the cocaine in which he was found to be in possession not been cooked into crack—more than satisfied each of the criteria and was sufficient to satisfy the needs of just punishment.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS VIOLATES *BOOKER* AND *RITA* BY ELEVATING THE GUIDELINES ABOVE OTHER RELEVANT SENTENCING FACTORS.

A. *Rita* Holds That The Guidelines Embody A Rough Approximation Of Section 3553(a) Because Of The "Empirical Approach" Used In Their Creation.

This Court has made clear that 18 U.S.C. § 3553(a) must be the touchstone of every federal sentencing decision. *See United States v. Booker*, 543 U.S. at 220, 268-69 (2005); *Rita v. United States*, 127 S. Ct. 2456, 2463 (2007); *see also id.* at 2468 (noting that a defendant may "contest[] the Guidelines sentence . . . under § 3553(a)"). District courts must weigh all of the § 3553(a) factors to arrive at a proper sentence. *Rita*, 127 S. Ct. at 2463. Although this Court held in *Rita* that appellate courts may employ a presumption of reasonableness when reviewing a within-Guidelines sentence, that is only because the "empirical approach"[3] utilized by the original

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[3] As noted in *Rita*, the Sentencing Commission created most of the Guidelines ranges by consulting 10,000 presentence reports to determine the base offense level for each crime and the corresponding sentencing ranges within which a judge could sentence. 127 S. Ct. at 2464; *see also* U.S. Sentencing Guidelines Manual, ch. 1, pt. A, introductory cmt. (1987).

Sentencing Commission, *id.* at 2464, resulted in sentencing ranges that "seek to embody the § 3553(a) considerations, both in principle and practice," *id.* at 2458. As the *Rita* Court described it, the Commission "tried to embody in the Guidelines the factors and considerations set forth in § 3553(a)." *Id.* at 2463. In order to do so, "the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Id.* at 2464. Thus, the Court concluded, this empirical approach created Guidelines that "insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Id.* at 2458.

B. The Drug Guidelines Are Not The Result Of An "Empirical Approach" And Do Not Embody The Section 3553(a) Factors.

1. While *Rita*'s description of the "empirical approach" used by the Commission may be accurate for some of the Guidelines,[4] it does not accurately describe the Guidelines for

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The 10,000 presentence reports helped identify "a list of relevant distinctions" that reflected those factors which "make a significant difference in sentencing decisions." *Id.* at ch. 1, pt. A. int. cmt.

[4] This brief focuses entirely on the drug Guidelines, which for all the reasons expressed herein were neither derived using an "empirical approach," as the Court described it in *Rita*, nor embody all of the § 3553(a) factors. To what extent other Guidelines similarly were not derived "empirically" is beyond the scope of the brief. We note, however, that the first Commission created sentences "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts," including, in addition to drug offenses, white collar offenses, robbery, murder, aggravated assault, immigration and rape, and that this deviation from past practice has continued up to the present, with the result that, as of 2002, federal offenders spent twice as long in prison as they did in 1984. United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 47, 53-54, 64, 67, 139 (2004), *available at*

drug offenses. *See, e.g.*, Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1059-62 (2001) (describing different approaches taken by the Sentencing Commission "[i]n setting sentencing levels for most non-drug offenses" versus sentencing levels for "drug crimes"). Because the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, went into effect after the Commission had finished its collection of empirical data on sentencing practices, the Commission did not rely on the drug sentencing data, all of which related to the previous drug laws. Instead, the Commission felt it was "necessary to project the impact of this new law" and created much harsher sentences for drug crimes than would have been derived by an empirical model looking at past sentencing practices. U.S. Sentencing Comm'n, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 58 (1987).

As a result, the Commission established base-offense levels for drug offenses that "are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute [*i.e.*, the quantities tied to the mandatory minimums]." U.S. Sentencing Guidelines Manual, § 2D1.1 cmt. background (1988). Rather than reflecting the myriad sentencing factors that would have been taken into account by past sentencing judges imposing actual sentences, "[t]he drug guidelines . . . are driven largely by drug quantity. The baseline sentence (base offense level) is determined by the type and amount of the controlled substance involved." William W. Wilkins, Jr., et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 Wake Forest L. Rev. 305, 314 (1993); *see also* Kyle O'Dowd, *The Need to Re-assess Quantity-Based Drug Sentences*, 12 Fed. Sent'g. R. 116, 116 (1999) (noting that the drug Guidelines "directly utilize and

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http://www.ussc.gov/15_year/15year.htm [hereinafter "U.S.S.C., *Fifteen Years*"].

incorporate the drug quantity thresholds from the mandatory minimum statutes as anchors for drug sentencing calculations" and "extrapolate sentences above and below these mandatory minimum sentences by also relying on drug quantities as the central determinate of offense severity").

2. Because of the approach used to create them, the drug Guidelines do not even remotely take account of all the § 3553(a) factors. By focusing almost exclusively on drug quantity and type, the Guidelines follow the example of the Anti-Drug Abuse Act of 1986 and attempt to tie every sentence to a single factor: the seriousness of the offense as measured solely by quantity and type of drug.

The 1986 Act created a two-tier framework of penalties focused on targeting "major" and "serious" drug offenders; the ten-year mandatory minimum was designed for "major traffickers" and the five-year mandatory minimum for "serious traffickers."[5] H.R. Rep. No. 99-845, pt. 1, at 16-18. *See also id.* at 11-12 ("The Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs," with a "second level of focus" on the "serious traffickers . . . [who] keep the street markets going."); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252-53 (1996) ("The decision to distinguish crack from powder [in the Act] coincided with the decision to punish 'serious' and 'major' traffickers more severely than others . . . . 'Serious' and 'major' drug traffickers were identified according to the amount of drugs with which they were apprehended."). Penalties for each of these categories are established based on the quantity of drugs

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[5] A "major trafficker" is defined as someone who operates a manufacturing or distribution network, and a "serious trafficker" as someone who manages "retail level traffic" in "substantial street quantities." H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

involved (depending on the type of drug), reflecting the notion that high-level offenders can be identified simply by reference to the particular quantity of drugs in their possession. *See, e.g.*, 132 Cong. Rec. S14301 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd) ("[T]he kingpins—the masterminds who are really running these operations—. . . can be identified by the amount of drugs with which they are involved."); H.R. Rep. No. 99-845, pt. 1, at 12 ("After consulting with a number of DEA agents and prosecutors about the distribution patterns for these various drugs, the Committee selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level.").[6]

Section 3553(a) mandates that sentencing judges "impose a sentence that is sufficient but not greater than necessary" to satisfy the needs of just punishment in light of the seriousness of the offense, deterrence, incapacitation, and rehabilitation. In selecting a particular sentence, a judge must consider: the history and characteristics of the defendant and the circumstances of the offense (including mitigating history, characteristics, and circumstances), the purposes just described and the "kinds of sentences available" (*i.e.*, the statutory maximum and minimums, if any, as opposed to the kinds of sentences recommended by the Guidelines), the Guidelines range, the policy statements, the need to avoid unwarranted disparities among defendants with similar records convicted of similar conduct (not the need to avoid sentences different from the Guidelines range), and the need to provide restitution to victims, if any. 18 U.S.C. § 3553(a); *see also Booker*, 543 U.S. at 268-69 (describing § 3553(a)).

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[6] In fact, the bill to which this testimony refers would have imposed 10-year minimums for 5 kilograms of powder cocaine and 100 grams of crack (as opposed to the 50 grams eventually enacted) and five-year minimums for 1 kilogram of powder cocaine and 20 grams of crack (as opposed to the 5 grams ultimately enacted), a 50:1 ratio).

The drug Guidelines do not, as discussed above, take into account most of these factors. By relying on drug quantity alone to generate Guidelines ranges, the Guidelines attempt to create a sentencing scheme that approximates the seriousness of the offense. But that factor alone dominates the scheme to the exclusion of every other statutorily mandated consideration, as the district court below explicitly recognized in expounding upon the reasons for imposing a below-Guidelines sentence:

> The sentencing guidelines as calculated exclude[] consideration of a number of factors that 3553(a) tells the Court that the Court should consider.
>
> The sentencing guidelines do not consider . . . the history and characteristics of the defendant. The sentencing guidelines do not consider the education and vocational skills of the defendant. It does not look at family ties and background. It does not look at military contributions. It excludes all of those. Yet the sentencing factors other than the guidelines say[] the Court should consider those.

J.A. 73.

C. The Drug Guidelines Do Not Always Accurately Reflect The Seriousness Of The Underlying Offense.

1. Indeed, because drug quantity and drug type do not always correlate to an individual defendant's culpability, or to the seriousness of the underlying offense, the Guidelines fail to reflect even the § 3553(a) "seriousness" factor in many cases. Crack cocaine is the classic example of how Congress failed to achieve its goal of targeting the most serious offenders through the simplistic method of tying penalties to drug type and quantity.

The congressional goal of targeting the most serious offenders was clearly among the most significant reasons underlying the 100:1 crack-powder ratio used in the 1986 Act to set mandatory minimum penalties for those substances.[7] Congress created the 100:1 ratio based on the perception that "because crack is so potent, drug dealers need to carry much smaller quantities of crack than of cocaine powder" to provide drug users with the same doses. 132 Cong. Rec. S8091 (daily ed. June 20, 1986) (statement of Sen. D'Amato). In addition, crack cocaine, more than any other drug, was considered to be correlated with other serious crimes. *See* United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 118-19 (1995), *available at* http://www.ussc.gov/crack/exec.htm [hereinafter "U.S.S.C., *1995 Special Report*"] (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs").

Historically, *low*-level crack cocaine *users* have received sentences similar to (and often higher than) *high*-level powder cocaine *importers*—the very suppliers who provide the powder cocaine that ultimately produces crack cocaine. *See* United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 63 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm

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[7] For this reason, the smaller quantity of crack cocaine drove the sentence received by Mr. Kimbrough. The Guidelines range of 168-210, J.A. 50-51 & n.1, would have been the same had he been captured with the same quantity of crack cocaine and no powder at all. *See* U.S. Sentencing Guidelines ch. 5, pt. A, sent. chart (2004) (imposing a sentence of 168-210 months for a criminal category history category II offender with an offense level of 34, based on 50 grams or more of crack cocaine plus a weapon). And, if all the cocaine had been powder cocaine, his sentence would have been only 37-46 months under the Guidelines. *Id.* (imposing a sentence of 37-46 months for a criminal history category II offender with an offense level of 20 based on 100-200 grams of powder cocaine plus a weapon).

[hereinafter "U.S.S.C., *2002 Report*"] (average sentence of lowest-level crack cocaine offenders was 104 months); *id.* at 43, 45 (average sentence of highest-level powder cocaine traffickers was 101 months).[8] Viewed on a gram-by-gram basis, street level crack dealers are punished 300 times more severely than high-level cocaine powder importers. Eric E. Sterling, *Getting Justice Off Its Junk Food Diet*, White Paper (July 17, 2006), at 4, *available at* http://www.cjpf.org/Getting_Justice_Off_Its_Junk_Food_Diet.pdf. Crack defendants also have the longest average period of incarceration of *any* drug offender—approximately 120 months. United States Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2006), Fig. L, *available at* http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm [hereinafter "U.S.S.C., *Sourcebook*"].

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[8] The recently released Commission Report indicates that low-level crack offenders have, over the most recent five-year period, received somewhat lower sentences than high-level powder cocaine offenders. *See* United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 30 (2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter "U.S.S.C., *2007 Report*"]. While it is encouraging that the lowest-level crack offenders were not punished more severely (on average) than their higher-level superiors (who supply the powder that is cooked into crack cocaine) between 2000 and 2005, the sentences for these categories of powder and crack offenders remain discouragingly similar, and fail to meaningfully distinguish between the serious offenders Congress intended to target and the low-level offenders it did not. In addition, even the new data demonstrates that crack cocaine wholesalers receive higher sentences than the highest-level powder cocaine offenders. *Id.* It is also discouraging that, over the most recent five-year period, "[i]n contrast to powder cocaine [offenders, who were more often in high-level functions than in the previous sample], crack cocaine offenders continue to cluster only in the street-level dealer category." *Id.* at 21.

It is also not clear that this small five-year snapshot showing a move toward more rational sentencing (or, at least, a less irrational system) will remain the trend, although a decision by this Court affirming Mr. Kimbrough's sentence would certainly encourage it.

In a Special Report to Congress in 1995, the Commission used the facts of an actual federal case to illustrate the impact of the 100:1 ratio in practice. In its illustration, two crack defendants purchased 255 grams of powder cocaine from their higher-level supplier and cooked it, yielding 88 grams of crack cocaine they intended to distribute. The higher-level powder supplier was subject to a Guidelines range of 33 to 41 months for selling 255 grams of power, whereas the crack defendants were each subject to a range of 121 to 151 months for buying a portion of the supplier's powder and cooking it. In addition, the crack defendants faced ten-year mandatory minimums, while the supplier was not subject to any mandatory minimum. *See* U.S.S.C., *1995 Special Report*, *supra*, at 174.

Two decades of experience have shown that the 100:1 ratio has resulted in a disproportionate number of low-level offenders being prosecuted for crack offenses. In 2000, barely one in five crack cocaine defendants met the criteria of a "major" or "serious" trafficker. *See* U.S.S.C., *2002 Report*, *supra*, at 39 (noting that, in 2000, approximately 73% of convicted crack cocaine offenders were "street-level" dealers, users, and the like, while only about 21% of defendants were mid-level offenders, such as importers, suppliers, or managers, and less than 6% were the highest-level offenders). This state of affairs is the very antithesis of what Congress had in mind in establishing the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

In fact, none of the original justifications for the 100:1 ratio have survived two decades' worth of careful scrutiny. "More recent data indicate that significantly less trafficking-related violence or systemic violence . . . is associated with crack cocaine trafficking offenses than previously assumed." U.S.S.C., *2002 Report*, *supra*, at 100. This continues to be the case: in fact, "the prevalence of violence decreased [between 2000 and 2005] . . . continuing a trend identified in the 2002

Commission Report, [and] continues to occur in only a minority of offenses." U.S.S.C., *2007 Report*, *supra*, at 36; *id.* at 37 (percentage of crack offenses categorized as "violent" only 10.4%); *id.* at 33 (in 2005, only 2.9% of crack cocaine offenders used a weapon); *see also* United States Sentencing Comm'n, Transcript of Public Hearing on Cocaine Sentencing Policy 226-27 (Nov. 14, 2006), *available at* http://www.ussc.gov/hearings/11_15_06/testimony.pdf [hereinafter "U.S.S.C., 2006 Public Hearing Tr."] (Test. of Profs. Jonathan Caulkins & Peter Reuter) (crack cocaine violence has declined over time because the average age of crack users has increased).[9] And that is to say nothing of the problem we have already identified, namely that the 100:1 ratio can result in lengthier sentences for low-level crack users than for the very high-level powder cocaine dealers who supply the drugs needed to convert powder cocaine into crack cocaine.

Nor can the 100:1 ratio be sustained based on the other oft-cited justification: the false perception that there are tangible differences between the two substances. *See, e.g.*, 132 Cong. Rec. 26447 (1986) (statement of Sen. Chiles) (stating that disparate "treatment is absolutely essential because of the especially lethal characteristics of this [crack] form of cocaine"). The Director of the National Institute on Drug Abuse, a division of the U.S. Department of Health & Human Services, recently debunked that myth by testifying that "the pharmacological effects of cocaine are the same, regardless of whether it is in the form of cocaine hydrochloride [powder] or crack cocaine, the base." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 166 (Test. of Dr. Nora D.

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[9] In any event, district courts will, of course, impose higher penalties in cases involving violence, regardless of the type of drug at issue in the underlying offense. *See, e.g.*, U.S. Sentencing Guidelines §§ 2D1.1(b)(1), 2K2.1(b)(6) (weapons enhancements).

Volkow, Director, Nat'l Inst. on Drug Abuse, Nat'l Institutes of Health, U.S. Dept. of Health & Human Servs.).[10]

2. Because of this failure to achieve its original goals, the Commission has urged Congress to eliminate the 100:1 ratio pursuant to its statutory duty to monitor the operation of the Guidelines and federal sentencing system and to propose amendments to Congress for appropriate modifications, *see* 28 U.S.C. § 994.

In 1995, the Commission released a report concluding that congressional objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on a federal sentencing scheme that includes the 100:1 quantity ratio. *See* U.S.S.C., *1995 Special Report*, *supra*, at 198-200. In reaching this conclusion, the Commission noted that the ratio punishes low-level crack offenders more harshly than wholesale powder distributors. *See id.* at 150-51. The Commission also cited the disproportionate impact of the policy on African-American defendants. *See id.* at 192.

In 1997, the Commission returned to Congress with a report once again recommending a modification to the 100:1

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[10] The Sentencing Commission has likewise noted that the differential treatment cannot be justified based upon this alleged difference. *See* U.S.S.C., *Fifteen Years*, *supra*, at 132. The Commission noted in particular that:

> [T]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. . . . Powder cocaine that is smoked is equally addictive as crack cocaine, and powder cocaine that is injected is more harmful and more addictive than crack cocaine . . . . Recent research has demonstrated that some of the worst harms thought to be associated with crack cocaine use, such as disabilities associated with pre-natal cocaine exposure, are not as severe as initially feared and no more serious from crack cocaine exposure than from powder cocaine exposure.

Id.

ratio. *See* United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF; *see also id.* at 9 ("[A]s the Commission reported in 1995, we again unanimously conclude that congressional objectives can be achieved more effectively without relying on the current federal sentencing scheme for cocaine offenses that includes the 100-to-1 quantity ratio."). This time, the Commission focused on the incongruity of crack cocaine sentences when measured against the harm to society from the use and sale of the drug. *See id.* at 9. Specifically, the Commission stated that, in its view, "federal sentencing policy should reflect federal priorities by targeting the most serious offenders in order to curb . . . drug trafficking and violent crime," and noted that "current federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year minimum penalty for crack cocaine too low." *Id.* at 7.[11]

Even more recently, the Commission has reiterated its position, having specifically singled out the crack-powder disparity as a category having an "adverse [racial] impact," U.S.S.C., *Fifteen Years*, *supra*, at 131. Accordingly, the Commission concluded, "[r]evising the crack cocaine thresholds would . . . dramatically improve the fairness of the

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[11] Shortly before certiorari was granted, the Commission released its most recent report. Reiterating its positions from the past Reports described above, the Commission has revised the crack Guideline ranges, a change that will go into effect in November 2007 assuming that Congress does not reject the proposal. *See* 28 U.S.C. § 994. While the new Guidelines are somewhat less harsh than the version at issue here, such that § 3553(a) factors may indicate that a within-Guidelines sentence is warranted in a somewhat higher percentage of cases than formerly, the new Guidelines are unlikely to have a significant impact, in large part because they are still tied to quantity and type (which remain, even with the modifications an inapt approximation of seriousness in crack cases) and do not embody other relevant statutory factors.

federal sentencing system." *Id.* at 132. The Commission's concern stems from its central mission, as articulated by the relevant enabling statutes. Section 991(b)(1)(B) of Title 28, for example, mandates that the Commission "provide certainty and fairness in meeting the purposes of sentencing, avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[12]

3. Just as the Commission has made a "wholesale" judgment excoriating the crack-powder disparity, so too have district courts been making similar judgments in practice at the "retail" level. *Cf. Rita*, 127 S. Ct. at 2488 ("The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale."). Just as did the district court below, other federal courts have concluded that the Guidelines range may often be inappropriate in crack cocaine cases.

In *United States v. Fisher*, for example, the district court determined that the Guidelines range applicable to a crack cocaine defendant "substantially overstat[ed] the seriousness of the offense" following an analysis that discussed past criticisms of the 100:1 ratio. 451 F. Supp. 2d 553, 560-65

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[12] Although Congress has acknowledged the criticism of the 100:1 powder-to-crack ratio in asking the Commission to make recommendations regarding whether it should eliminate or reduce the disparity, it has failed to act on the Commission's repeated recommendations. *See, e.g.*, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995) (rejecting Commission's recommendations); *see also United States v. Pho*, 433 F.3d 53, 56 (1st Cir. 2006) (reporting congressional inaction in face of Commission's recommendations since 1995).

(S.D.N.Y. 2005).[13] As another district court summed up, "[t]he growing sentiment in the district courts is clear" that the 100:1 ratio "cannot withstand . . . scrutiny" under § 3553(a). *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005).[14]

Likewise, several appellate judges have made the point that, following *Booker*'s mandate that judges consider all of the factors listed under § 3553(a), "a sentencing court is not only *permitted* but is *required* to evaluate the propriety of applying the 100:1 crack-cocaine ratio in a particular case." *United States v. Williams*, 472 F.3d 835, 848 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing *en banc*) (emphases in original). As another judge specifically noted, the Commission's findings with respect to the effects of the 100:1 ratio "can help sentencing courts analyze the § 3553(a) factors . . . . The Commission's findings, in other words, can be considered insofar as they are *refracted through* an individual defendant's case." *United States v. Eura*, 440 F.3d 625, 637 (4th Cir. 2006) (Michael, J., concurring) (emphasis in original); *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("district courts may consider the crack/powder cocaine differential in the Guidelines as a

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[13] The Second Circuit has recently concluded that it may not adopt a weight ratio other than the 100:1 ratio prescribed by Congress, and expressly mentioned both the *Fisher* and *Perry* district court opinions (discussed above) as having indicated disagreement with the ratio. *See United States v. Castillo*, 460 F.3d 337, 352-53 (2d Cir. 2006). The court nonetheless expressly noted that it "[d]id not express any opinion on the reasonableness of [either] of those sentences in light of the specific facts involved in those cases." *Id.* at 353 n.4.

[14] In fact, a substantial number of district courts have issued opinions with similarly explicit discussions since *Booker*. *See, e.g.*, *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243 (E.D. Tenn. May 6, 2005); *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

factor, but not a mandate, in the post-*Booker* sentencing process").

District courts have struggled against strictures imposed on them that prevent them from taking the well-known crack realities into account. As one judge asked on remand, after being reversed by the Eleventh Circuit,

> So what am I to do? . . . Am I to (somehow) ignore the widely held belief that the crack-powder disparity is inherently unjust; or may I subconsciously consider it in relationship to the offense conduct so long as it does not overwhelm my subjective judgment? . . . Should I . . . subvert my own sense of justice in order to purify my consideration of the statutory factors? Is that even humanly possible?

United States v. Williams, 481 F. Supp. 2d 1298, 1302 (M.D. Fla. 2007). Similarly, another judge on remand acknowledged he could no longer figure the crack-powder distinction into his analysis, but he concluded that "just as an 87-month sentence was determined to be sufficient but not greater than necessary to comply with § 3553(a)(2) in May 2005, so it still is today." *United States v. Castillo*, No. 03 CR 835 (RWS), 2007 U.S. Dist. LEXIS 7422, at *23 (S.D.N.Y. Jan. 25, 2007).[15]

For the many reasons these judges have articulated, below-Guidelines range sentences may be—indeed, often *will*

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[15] Judge Sweet altered the sentence a month later to "comply with the Second Circuit's opinion," extending it to 111 months, but only after noting that his initial determination that "an 87-month sentence was sufficient but not greater than necessary to comply with § 3553(a)(2)" "still holds." *United States v. Castillo*, No. 03 CR 835(RWS), 2007 WL 582749, at *8 (S.D.N.Y. Feb. 26, 2007).

be—the only reasonable and just choice in many crack cocaine cases following *Booker*.

4. Requiring sentences that actually reflect the seriousness of the underlying offense may have the beneficial side effect of refocusing congressional objectives. While Congress intended the 1986 Act to "give greater direction to the DEA and the U.S. Attorneys on how to focus scarce law enforcement resources," H.R. Rep. No. 99-845, pt. 1, at 11, the prosecution of crack offenders has followed precisely the opposite course over time, *see* U.S.S.C., 2006 Public Hearing Tr., *supra*, at 40-41 (Test. of Joseph Rannazzisi, Drug Enforcement Administration) (describing small-scale nature of crack cocaine operations generally and specifically noting that most operations involve only small numbers of ounces). Crack prosecutions generally involve low-level and non-violent offenders—often first-time offenders—yet also generally result in long prison sentences.[16] These prosecutions have therefore turned federal drug policy on its head. After all, "*every* federal case against a street-level or local trafficker—who could be investigated and prosecuted by state and local law enforcement agencies—is a distraction from the critical federal role and a waste of federal resources." Sterling, *supra*, at 3. As Eric E. Sterling, former assistant counsel to the House Judiciary Committee and current President of the Criminal Justice Policy Foundation, has

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[16] It is not uncommon today for federal law enforcement to insist that low-level suppliers convert powder cocaine into crack in order to set the stage for prosecution of cases involving potentially draconian crack sentences. *See, e.g.*, *United States v. Fontes*, 415 F.3d 174, 177-78 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant brought for sale and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [to produce an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . . .").

noted, "[t]he organizers of [the international drug trade] are virtually immune from investigation by county sheriffs, municipal police departments, or state narcotics bureaus. If the Department of Justice, the Department of Homeland Security and the Department of the Treasury are not focused primarily on those international and national cases—*and they have not been*—then those cases are not being brought." *Id.* (emphasis in original).

Equally as troubling as the fact that federal prosecutors are focusing undue resources on low-level offenses is the fact that they are inappropriately federalizing what is properly the domain of the states: the prosecution of low-level and intrastate drug offenders. In doing so, they are also imposing a federal judgment that is inconsistent with that of all 50 states (as well as the District of Columbia). *See* U.S.S.C., *2007 Report*, *supra*, at 99 (noting that the lone state (Iowa) that formerly used the same extreme 100:1 crack-powder ratio employed by the federal system abolished use of the ratio in 2006 and replaced it with a 10:1 ratio). Indeed, the Commission recently noted that that only thirteen states maintain *any* "form of distinction between crack cocaine and powder cocaine in their penalty schemes." *Id.* at 98.[17] And even those states use considerably smaller differential ratios to distinguish between crack cocaine and powder cocaine offenders. *See id.* at 105-06 (summarizes ratios which range from 2:1 to 75:1, with most of these set at 10:1 or less and only two states greater than 28:1).

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[17] South Carolina, one of the 13 states that distinguishes between crack and powder cocaine offenses, sometimes treats crack offenders more harshly than powder offenders and other times does the opposite. For example, a first-time crack cocaine offender has a higher statutory maximum penalty than a first-time powder cocaine offender, while a second-time powder cocaine offender is penalized more severely (5 to 30 years' imprisonment) than a second-time crack cocaine offender (0 to 25 years' imprisonment). *See* U.S.S.C., *2007 Report*, *supra*, at 103-04.

The instant case is a perfect example. The Eastern District of Virginia, the district in which the case was prosecuted, has the largest number of small-quantity crack cases in the country. *See* U.S.S.C., *2007 Report*, *supra*, at 112-13 tbl. 5-3 (showing that the E.D. Va. has the highest number of crack cocaine cases involving less than 25 grams). Small-quantity cases comprise nearly 40% of the crack cocaine caseload in this district.[18] This is entirely consistent with the federal docket generally. Of all federal crack cocaine prosecutions in fiscal year 2006, 35.1% involved small quantities of crack (less than 25 grams). *Id.* The instant case involved quantities barely large enough to trigger the mandatory minimum under federal law. Had it been prosecuted under state law, the amounts involved would not have triggered a mandatory minimum sentence, and a mere 2:1 crack-powder ratio would have applied. *See id.* at 106 tbl. 5-1.

Disproportionate crack prison sentences like Mr. Kimbrough's have also had a devastating impact not only on low-level offenders, but on their families and communities, particularly in poor urban areas. The racial disparity created by the 100:1 ratio "undermine[s] public confidence in the federal courts." U.S.S.C., *Fifteen Years*, *supra*, at 131; *see also* U.S.S.C., 2006 Public Hearing Tr., *supra*, at 106 (Test. of Judge Reggie Walton) ("I frequently will go over to my old court, the local court here in Washington, and have lunch with my former colleagues, and they express concerns about the disparity that exists in the federal system, that's having a spill-over effect in the local system even though they don't have a disparity, because people in the community are astute enough to know about the disparity, and they bring concerns into the courtroom as potential jurors and, as a result of that, many

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[18] This percentage comports with the focus on low-level crack offenders. In most federal districts, more than a third of crack prosecutions involve less than 25 grams of crack. *See* U.S.S.C., *2007 Report*, *supra*, at 112-13 tbl. 5-3.

times will say they can't serve as jurors . . . ."). Additionally, as one commentator recently noted, the federal policy of "stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders . . . ." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (Test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center).

Tragically, a vastly disproportionate number of those incarcerated low-level drug offenders are African-American (as is Mr. Kimbrough).[19] "The number of black federal crack defendants is ten times the number of white defendants." Sterling, *supra*, at 1. "In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African American." U.S.S.C., *Fifteen Years*, *supra*, at 131.[20] As a result, crack cocaine penalties help explain the enormous racial gap in sentences being served by black and white inmates in the federal penal system. Raising the crack cocaine threshold from 5 grams to 25 grams alone would "reduce the gap in average prison sentences between Black

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[19] As of 2005, one in twelve African-American men in their late twenties was incarcerated. *See* Paige M. Harrison & Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, at 8 (2006). In addition, if current trends continue, one in three black males born today will spend some portion of his adult life incarcerated in a state or federal prison. *See* Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, Bureau of Justice Statistics, at 8 (2003). "[T]he black community as a whole suffers a comparative disadvantage when many of its young men spend their formative years behind bars . . . ." Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. Tol. L. Rev. 215, 231 (1994).

[20] The strong racial correlation of federal crack defendants exists despite the fact that "whites comprise a majority of crack users." Marc Mauer, *Race to Incarcerate* 172 (2d ed. 2006).

and White offenders by 9.2 months." *Id.* at 132. The existing problem is so severe that commentators have labeled the federal crack cocaine disparity the "new Jim Crow" law. Tr. of "Social Justice and the War on Drugs" (morning panel II) (Oct. 4, 2000) (statements of Hon. Robert Sweet and former Baltimore mayor Kurt Schmoke), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html.

The costs of draconian crack sentences are borne not only by "deteriorating neighborhoods" but by taxpayers forced to shoulder the bill for offenders serving "inordinately lengthy sentences at an enormous cost." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (Test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center). Lengthy sentences for low-level, first-time offenders contribute substantially to the growing federal prison overcrowding problem. *See* Marc Mauer, *Race to Incarcerate* 167-69, 172 (2d ed. 2006) (documenting rise in number of prisoners and particularly those incarcerated for drug offenses); *see also id.* at 162 ("[L]aw enforcement is more likely to target cocaine users or crack cocaine users.").[21]

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[21] Furthermore, in terms of the risk of recidivism, "[t]he folly of using expensive prison space for drug offenders, even traffickers, has been documented in research conducted on the federal prison population." Mauer, *supra*, at 172. Using data that showed the recidivism rates for a comparable group of offenders released from prison in 1987, the study showed that "only 19 percent of the low-risk drug traffickers [*i.e.*, more than 30 percent of the total federal drug prisoner population] were re-arrested during the three years after release, and that none of those arrested were charged with serious crimes of violence." *Id.* at 172-73.

D. Because The Drug Guidelines In General And The Crack Guidelines In Particular Do Not Embody The Section 3553(a) Factors, Sentencing Judges Need Not Provide Special Justifications For Imposing Below-Guidelines Sentences In Such Cases.

1. Section 3553(a), not the Guidelines, is the starting and ending point for sentencing judges. Pursuant to this Court's decision in *Booker*, sentencing courts may consider Guidelines ranges, but they are now non-binding and are but one factor among many: courts are instructed to consider all of the § 3553(a) factors and "tailor the sentence" according to these statutory considerations. *Booker*, 543 U.S. at 245. After *Booker*, as one court recently put it, sentencing judges are "to evaluate how well the applicable Guideline effectuates the purposes of sentencing enumerated in § 3553(a)" without affording the Guidelines undue weight. *United States v. Pickett*, 475 F.3d 1347, 1353 (D.C. Cir. 2007).

Sentencing courts fulfill their statutory duty in the usual manner, without any special requirements. *See, e.g.*, *Rita*, 127 S. Ct. at 2468 (no special or long statement required from judge in making sentencing decision). Just as any court may consider relevant and helpful sources in rendering a judicial opinion, sentencing judges may consider—indeed, should consider—any and all helpful sources of information presented to them. Reports of the Sentencing Commission may be helpful in certain cases. In cases involving crack cocaine, a subject on which the Commission has released thousands of pages of expert conclusions, they may prove particularly pertinent.[22]

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[22] In other contexts, of course, other types of data and sources may be pertinent. This brief focuses on Commission reports because they are a particularly helpful source of information in the crack cocaine context to which this brief is addressed (and which the courts below were focused given the nature of this case).

Indeed, in any given drug case, the Guidelines may prove to be of limited assistance to a district judge attempting to balance all of the relevant statutory factors. Sentencing courts fulfill the statutory mandate to impose fair and consistent sentences by evaluating the actual threat posed by the individual defendant. By emphasizing only one aspect of the underlying offenses and their attendant circumstances, the Guidelines ranges failed to embody the statutory factors that were required to be taken into account, or the statutory mandate that a sentence be "sufficient but not greater than necessary" to satisfy the needs of just punishment. While the shorthand of using drug quantity and drug type may work in some cases to ensure that more dangerous and higher-level drug criminals should receive longer sentences, these proxies do not work in every case.

Allowing district courts to render sentences with regard only to the relevant § 3553(a) factors may enable the Sentencing Commission to create new drug Guidelines using the same empirical approach described approvingly by this Court in *Rita*. As this Court noted, "The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita*, 127 S. Ct. at 2464. Were the Commission able to collect data in which district courts acted as dutifully and painstakingly as the judges did below, it would be an easy task to create a rational and uniform scheme of sentencing ranges that truly embodied all of the statutory factors the Commission was ordered to take into account in drug cases, as in others.

2. Nor is there any reason to fear that the *Booker* standard, properly employed, confers unlimited discretion on sentencing judges. Courts still must weigh all the factors and arrive at a sentence that is reasonable in light of them. Moreover, many federal statutes contain mandatory minimums, and in such cases judges will have a starting point

they cannot go below. *See, e.g.*, 12 U.S.C. § 630 (minimum of 2 years' imprisonment for embezzlement, fraud, or false entries by a bank officer); 18 U.S.C. § 225 (minimum of ten years' imprisonment for organizing, managing, or supervising a continuing financial crimes enterprise); 18 U.S.C. § 2251(d) (minimum of five years' imprisonment for a second offense of sexually exploiting a minor). *Cf. Harris v. United States*, 536 U.S. 545, 557 (2002) (upholding judicial fact-finding that increased statutory minimum sentence).

In crack cocaine cases, in particular, unless and until Congress revisits the current mandatory minimum regime of 5 (and 10) years for 5 (and 50) grams of crack, minimum sentences will be triggered in approximately 80% of all crack cocaine cases, just as it was here. *See* U.S.S.C., *Sourcebook*, *supra*, tbl. 43, *available at* http://www.ussc.gov/ANNRPT/2006/table43.pdf. At the same time, however, many crack cases will involve facts like the ones at issue here (or other fact patterns equally deserving of lighter sentences than the Guidelines range would permit). As noted above, not only was Mr. Kimbrough found to be in possession of roughly twice as much powder cocaine as crack (a fact which had no relevance to his sentence), but Mr. Kimbrough had only a minor criminal record, involving misdemeanors, prior to his arrest in the instant case, as well as an admirable and notable military and work history. Accordingly, as the district court judge noted, evaluating his offense from the vantage point of experience, "the crack cocaine involved in this case does in fact exaggerate the advisory sentencing guideline involved in this case." J.A. 74; *see also id.* ("the Court believes that should it follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case").

E. The Sentence Imposed By The District Court Was Not Unreasonable.

Courts simply are not doing the job with which they were entrusted by Congress following *Booker* when they adhere blindly to Guidelines that fail to reflect an offender's actual culpability. Yet, when they are reversed for not following the Guidelines, as occurred here, they are apt to think twice about fulfilling their statutory duty the next time. This case provides the perfect vehicle for this Court to send a message to the courts of appeals. The district court did precisely what it was supposed to do and should be lauded not lambasted.

After listening carefully to arguments by both the defendant and the government, the district court carefully explained that it understood that it was

> required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective way.

J.A. 72. After this summary of the relevant statutory factors, the court noted further that it was "required to consider factors other than what the sentencing guidelines recommend." *Id.* Moreover, given the nature of the offense, "[t]he sentencing guidelines as calculated exclude[] consideration of a number of factors that 3553(a) tells the Court" to consider. *Id.*

> The sentencing guidelines do not consider . . . the history and characteristics of the defendant. The sentencing guidelines do not consider the education and vocational skills of the defendant. It does not look at family ties and background. It

> does not look at military contributions. It excludes all of those. Yet the sentencing factors other than the guidelines says the Court should consider those.

Id.

Then, the court considered those very factors, as it was bound to do. It considered the fact that Mr. Kimbrough had never before had a felony conviction, that he had served his country in Iraq "and honored his country and received an honorable discharge," and that since then he has been gainfully and meaningfully employed as a construction worker. J.A. 74.

Finally, the court noted "that the crack cocaine involved in this case does in fact exaggerate the advisory guideline" range such that imposing a Guideline sentence would be "greater than necessary" to accomplish the goals of the statute. J.A. 74. Accordingly, the judge imposed upon Mr. Kimbrough, a low-level cocaine offender with no previous felony conviction, a sentence of 180 months. J.A. 76.

It is hard to imagine a district court performing its sentencing role more clearly or dutifully than the district court here. Indeed, given all the facts of this case, and the realities of crack cocaine sentencing in general, it is hard to imagine a Guidelines sentence would have been appropriate or reasonable in this case. And, even if the case could be made that a Guidelines sentence would have been reasonable, the sentence actually imposed cannot be considered *unreasonable*. *See Booker*, 543 U.S. at 765. The district court's sentence was, at a minimum, well within its discretion following *Booker*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MATTHEW M. SHORS
(Counsel of Record)
PAMMELA QUINN
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

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